(5)

No. 97-1802

In The

Supreme Court of the United States

October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Does a prosecutor violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury?

2. If the answer to the first question is "yes", was such a right on the part of the attorney clearly established in March, 1994?

LIST OF PARTIES

The Parties are Petitioners/Defendants David Conn and Carol Najera and Respondent/Plaintiff Paul Gabbert.[1]

[1] Other Defendants who are not parties to this petition include the City of Beverly Hills, Detective Leslie Zoeller, and Special Master Elliot Oppenheim.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997). The order denying the petition for rehearing and rejecting the suggestion for rehearing en banc was not reported. A copy of the opinion and order denying the petition for rehearing and rejecting the suggestion for rehearing en banc are annexed in the appendix to the petition for certiorari as Appendices A and F, respectively.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on December 8, 1997. A timely petition for rehearing and suggestion for rehearing en banc was denied by order filed on February 2, 1998. The underlying action arose under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the District Court's jurisdiction was based on 28 U.S.C. § 1331. Jurisdiction of this court was invoked under 28 U.S.C. § 1254(1). Petitioners' Petition for Writ of Certiorari was filed in the Supreme Court on May 4, 1998 (Supreme Court Case No. 97-1802). This Court's order granting certiorari was issued on October 5, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the Respondent under 42 U.S.C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity

or other proper proceeding for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

This Court granted certiorari to determine whether petitioners violated the fourteenth amendment, which provides in pertinent part:

FOURTEENTH AMENDMENT (Section 1):

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History Of The Litigation In The District Court And Summary Of The Ninth Circuit's Opinion.

Plaintiff and Respondent, Paul Gabbert (hereinafter to be referred to as Respondent) sued Petitioners David Conn and Carol Najera for violating his federal civil rights under 42 U.S.C. § 1983.[1] Respondent's Section 1983 claims were based upon the fourth, sixth and fourteenth amendments of the United States Constitution. Respondent filed his complaint on June 23, 1994, in the United

[1] The City of Beverly Hills, City of Beverly Hills Police Detective Leslie Zoeller, and Special Master Elliot Oppenheim were also defendants.

States District Court for the Central District of California. (J.A. 6).

On September 30, 1994, the District Court granted in part and denied in part the Petitioners' motion to dismiss made pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6), dismissing all of the Respondent's claims except for his fourteenth amendment claim for interference with his right to practice his profession. (Pet. App. B). On February 8, 1995, the District Court denied Respondent's motion for leave to file a First Amended Complaint to add a state law cause of action under California Penal Code Section 1524. (Pet. App. C, Pages C-2 and C-5).

On October 3, 1995, the District Court granted summary judgment in favor of the Petitioners and against the Respondent. (Pet. App. D and E).

The District Court granted Petitioners' Motion for Summary Judgment on the basis of qualified immunity, but it refused to grant the Petitioners' Motion for Summary Judgment on the ground of absolute prosecutorial immunity.

On October 19, 1995, Respondent filed a timely notice of appeal to the United States Court of Appeals for the Ninth Circuit. On December 8, 1997, the Ninth Circuit reversed the summary judgment granted in favor of Petitioners for the following reasons: (1) Petitioners violated Respondent's fourteenth amendment right to practice his profession without interference by the Government; (2) Respondent's fourteenth amendment right to freely render legal assistance to his client whenever she chose to seek his advice regarding her grand jury testimony was clearly established; and (3) the Petitioners' conduct was not objectively reasonable. The Ninth Circuit also reversed the dismissal of Respondent's fourth amendment claims as to Petitioner David Conn with regard to the second search conducted by Detective Leslie Zoeller (Pet. App. A), and it upheld the District Court's denial of absolute prosecutorial immunity. On February 2, 1998,

the Ninth Circuit denied the Petitioners' petition for rehearing and rejected the Petitioner's suggestion for rehearing en banc. (Pet. App. F, Page F-1).

B. Summary Of The Evidence

Respondent Paul Gabbert is a criminal defense attorney who represented Traci Baker during a grand jury investigation. Prior to retaining Respondent as her counsel, Traci Baker testified as a defense witness in the highly publicized first murder trial of Lyle and Erik Menendez, who were later convicted in their second murder trial after the first trial ended in a hung jury. Subsequent to the first trial the Los Angeles County District Attorney's Office reassigned the second murder trial of the Menendez brothers to prosecutors David Conn and Carol Najera.

Once the first trial was completed the District Attorney's office learned that Lyle Menendez had purportedly written a letter to Traci Baker, wherein he instructed her to testify falsely. The letter was also believed to be a "script for her testimony." Upon discovering this information David Conn obtained a subpoena directing Traci Baker to testify before the Los Angeles County grand jury, and to produce any correspondence that she had received from Lyle Menendez.

On February 11, 1994, Traci Baker retained Respondent Paul Gabbert to represent her, because she had learned that the District Attorney's office was conducting an investigation related to her testimony. On March 17, 1994, Beverly Hills Police Department Detective Leslie Zoeller, who was the investigating detective assigned to the Menendez murder case, served the grand jury subpoena on Traci Baker at Respondent's law office. According to the subpoena, Traci Baker was commanded to appear before the grand jury on March 21, 1994, and she was required to bring with her "any correspondence" from Lyle Menendez.

On March 18, 1994, Respondent filed an ex parte Motion to Quash the portion of the subpoena that required Traci Baker to produce correspondence from Lyle Menendez. However, on the same day, a Los Angeles Superior Court Judge denied Respondent's ex parte motion to shorten time for the hearing on the Motion to Quash. Also, on March 18, 1994, Detective Leslie Zoeller obtained a search warrant for Traci Baker's apartment for any correspondence from Lyle Menendez. Later that same day Detective Zoeller, accompanied by Prosecutors David Conn and Carol Najera, served the search warrant on Traci Baker at her apartment. When the search warrant was presented to Ms. Baker she stated that, "all the things that you're looking for are with my attorney." The search of Ms. Baker's apartment did not lead to the recovery of any of the correspondence specified in the warrant. This led the prosecutors and Detective Zoeller to believe that the items called for in the search warrant were in the possession, custody and control of Respondent.

On March 21, 1994, Respondent and Traci Baker appeared at the Los Angeles County Criminal Court's Building for Baker's grand jury testimony as mandated by the grand jury subpoena. Respondent and Traci Baker arrived at the Criminal Court's Building at about 7:30 a.m., and they checked in with the grand jury bailiff at about 8:30 a.m. At approximately 10:03 a.m., a search warrant was obtained for Respondent, and Ms. Baker. A few minutes before 10:54 a.m., Respondent was approached by Detective Leslie Zoeller who presented him a search warrant for his briefcase, his person and Ms. Baker's person. The search warrant was limited to being served between the hours of 7:00 a.m. and 10:00 p.m.

Once Respondent was served with the search warrant he was introduced to Special Master Elliot Oppenheim who would be conducting the search. After meeting the Special Master, Respondent read the search warrant and then advised the Special Master that they would need a private room. Respondent's request for the

private room to conduct the search was granted. At approximately the same time that Respondent was going to a private room with the Special Master, Ms. Baker was summoned to appear before the grand jury, but Respondent made no request to the Petitioners that his client's grand jury testimomy be delayed. Traci Baker entered the grand jury hearing room to begin her testimony at approximately 10:54 a.m., and she completed her testimony at about 11:12 a.m. When Traci Baker entered the grand jury room Petitioners, David Conn and Carol Najera, were inside the hearing room and Baker was questioned before the grand jury by Carol Najera.

After being sworn, the first question asked of Traci Baker by Carol Najera was "are you acquainted with the defendant Lyle Menendez," and she replied that she was unable to speak with her attorney because he was still with the special master, and she asked to go confer with Respondent. Consequently, Ms. Baker was granted permission to leave the hearing room. Shortly after Ms. Baker's departure from the hearing room, Petitioners exited the grand jury room, but they did not follow nor accompany Ms. Baker to Respondent.

Upon leaving the grand jury hearing room, Ms. Baker sought out Respondent, who was being searched by the Special Master. A female, believed to be the secretary of David Conn, learned that Baker needed to-speak with Respondent, so she went to the private room where the search was being conducted and advised Respondent that his client needed to speak with him. Respondent replied that he couldn't talk to Ms. Baker now, and that it will have to wait because he was being searched. The secretary then told Respondent that his client needs to talk to him right now. Respondent replied, "That's tough . . . they can wait as long as it takes."

Although Ms. Baker did not speak with Respondent at this time, she saw him from across the room while he was taking off his jacket. As a result of Respondent's body language or something he said verbally, she got the

indication from him that she should go back into the grand jury hearing room and assert her fifth amendment right. Therefore, Traci Baker returned to the grand jury hearing room to resume her testimony, but once she returned, she did not advise Petitioners that she was either unable to or had not consulted with Respondent. Consequently, the prosecutors were led to believe that she had consulted with Respondent, in accordance with her request to leave the grand jury room, because they were not present when Traci Baker observed Respondent.

When Traci Baker was recalled before the grand jury she was once again asked, "are you acquainted with the Defendant Lyle Menendez," and based upon the verbal indication or body language she had received from Respondent, she asserted, on the advice of counsel, her fifth amendment rights. The next question asked of Traci Baker was did she know Lyle Menendez in August of 1989. She replied, "I have to go confer with counsel . . . This is what I have been instructed to do," which further led the Petitioners to believe that she had consulted with Respondent when her first request to consult with Respondent was granted. Her request to consult with Respondent a second time was granted, and she left the grand jury hearing room to consult with Respondent while Petitioners remained inside the hearing room.

Traci Baker returned to the grand jury hearing room after a short pause and once again she was asked by Carol Najera if she knew Lyle Menendez in August of 1989. Traci Baker's response was, "based upon the advice of counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." This response convinced the prosecutors that she had consulted with Respondent during the second break in the grand jury proceedings. Carol Najera then asked Traci Baker if she had brought with her the documents specified in the subpoena, and Traci Baker's reply was that, "I'm going to have to again confer." Based upon this last response David Conn made a request to the grand jury

foreman to have the presiding judge determine whether or not her answer may tend to incriminate her. Consequently, a 10 minute recess was taken so that a conference could be held with the presiding judge, and during the recess Traci Baker was excused. Traci Baker's last response further assured the prosecutors that she had once again consulted with Respondent when she was excused to do so.

After the 10 minute recess, Traci Baker returned to the grand jury hearing room whereupon she was ordered by the grand jury foreman to go directly to Department 110 of the Superior Court for a contempt proceeding regarding her failure to produce the documents specified in the grand jury subpoena, and she was also declared in contempt of the grand jury. This was also the conclusion of her grand jury testimony and the time was approximately 11:12 a.m. when she left the grand jury hearing room for the last time.

Once Traci Baker was directed to Department 110, she met with Respondent and she was present when Respondent was subjected to a second search, this time by Detective Leslie Zoeller, outside of the grand jury room. The second search lasted about 5 minutes and, after it was completed, Respondent conferred with Traci Baker in a private room about her grand jury testimony. After Respondent conferred with Traci Baker about her grand jury testimony, he accompanied her to Department 110 for the contempt hearing. Respondent was present with and represented Traci Baker during the entire contempt hearing held in Department 110. The contempt hearing commenced at 11:40 a.m. and it concluded either shortly before or shortly after 12:00 noon.

SUMMARY OF THE ARGUMENT

1. A prosecutor does not violate an attorney's fourteenth amendment rights by causing the attorney to be searched when his client is testifying before the grand

jury, because said conduct by a prosecutor is not a violation of the substantive component of the due process clause. The substantive sphere of the due process clause is only violated when government officials engage in abusive, arbitrary or oppressive conduct. The prosecutors' decision to cause the search while Respondent's client was before the grand jury was not arbitrary or abusive, because the search was conducted pursuant to a valid search warrant. In addition, since Respondent had no constitutional right to be present in the grand jury room with his client, the search was in no way arbitrary or conscience shocking in a constitutional sense.

Another reason why the prosecutors' conduct was not arbitrary or abusive is that each time Traci Baker made a request to consult with her attorney, she was allowed to do so without any limitations or restrictions placed on either her or Respondent. Furthermore, the prosecutors were never advised nor made aware that once Traci Baker was excused from the proceedings she did not consult with her attorney. Also, causing the search was not a fourteenth amendment violation because implicit in the execution of a valid search warrant is a necessary interruption or delay of a person's activities.

The prosecutors did not deprive Respondent of occupational liberty or his right to practice his profession, because he was not excluded from the practice of law nor foreclosed from practicing his profession by the prosecutors' conduct. The valid search warrant only caused a temporary interruption in Respondent's ability to provide legal assistance to his client. His situation was analogous to where a person is not rehired in one job but is free to seek another job, which this court has held is not a deprivation of liberty. Although Respondent was temporarily distracted from providing legal assistance to his client, due to the execution of a valid search warrant, once the search was completed he continued to represent

his client as well as consult with her without any limitations or restrictions. Therefore, a mere temporary interruption in one's job is not a deprivation of a liberty interest.

The Ninth Circuit's decision in *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997), was wrongly decided because it allows for a fourteenth amendment violation to be established when government officials are engaged in lawful conduct. Under the *Gabbert v. Conn, supra,* decision, a person could delay or prevent the execution of a valid search warrant by invoking the fourteenth amendment, because under the *Gabbert* case any time the government executed a search warrant on a person who was either engaged in his occupation or simply on the way to his job or place of business, the government would be in violation of the person's fourteenth amendment rights.

The prosecutors did not violate any fourteenth amendment property rights of Respondent because their conduct did not result in the termination of his employment. The fact that Respondent continued to represent his client after the search conducted by the Special Master illustrates that Respondent's employment was not terminated. Further, Respondent was not deprived of a property interest because the prosecutors' conduct did not deprive him of future employment.

Another reason why Respondent was not deprived of his fourteenth amendment rights is because the prosecutors did not act with deliberate indifference, nor was their conduct conscience shocking. It is only the most egregious and conscience shocking government conduct that is cognizable under the substantive sphere of the due process clause. However, the prosecutors did not act with deliberate indifference because each of Traci Baker's requests to consult with Respondent were granted without any restrictions. Furthermore, the prosecutors were unaware that Traci Baker did not consult with Respondent when the proceedings were stopped for her to do so, and since the witness asserted her fifth amendment rights

upon the advice of counsel each time she returned to the grand jury room after being excused, the prosecutors believed that the witness had in fact consulted with Respondent.

There was no violation of the procedural due process component of the fourteenth amendment because there were adequate post-deprivation state law tort remedies available to plaintiff. Although a procedural due process claim was neither alleged in the complaint nor addressed by the Ninth Circuit, such a claim is barred because Respondent did not pursue his remedies under state tort law, such as claims for negligence or breach of a mandatory duty.

2. The prosecutors did not violate clearly established law because as of March, 1994, it was not clearly established that a prosecutor violates an attorney's fourteenth amendment rights by causing him to be searched when his client is called to testify before a grand jury. As of March 1994, neither the U.S. Supreme Court nor any of the 12 federal circuit courts of appeal had specifically held that a prosecutor violates an attorney's fourteenth amendment rights by causing the attorney to be searched, pursuant to a valid search warrant, when the attorney's client is testifying before a grand jury. In addition, there are no factually similar or analogous cases from either the U.S. Supreme Court nor the 12 federal circuit courts that made it apparent, in March 1994, that a prosecutor violates the law by causing an attorney to be searched at the time his client is testifying before the grand jury.

The Ninth Circuit's "common sense" standard for determining whether the law is clearly established does not provide the proper guideposts for evaluating whether the substantive component of the due process clause has been violated. In *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997), the court expanded the concept of liberty too far, because no reasonable prosecutor would have believed or known that under the pre-existing law in effect in March,

1994, that a search conducted pursuant to a valid warrant, on an attorney who had no right to accompany his client inside the grand jury room, could result in the deprivation of the attorney's fourteenth amendment right to practice his profession. Furthermore, it was neither obvious nor apparent under the case law as of March, 1994, that an attorney's fourteenth amendment right to occupational freedom could delay or prevent the execution of a valid search warrant.

The Ninth Circuit's "common sense" standard is too abstract and vague for determining when the law is clearly established, and therefore, this court should adopt a standard for determining clearly established law that requires a factually similar or analogous case from the U.S. Supreme Court on the issue in question, in order for the law to be clearly established. In the alternative, this court should adopt the bright line standard, which is used by some of the federal circuits, to determine when the law is clearly established. This court should also reject any standard for determining whether the law is clearly established which allows district court decisions to set clearly established law, because such a standard would place an unreasonable legal research obligation on government officials, and would make qualified immunity the rare exception rather than the general rule.

ARGUMENT

I. A PROSECUTOR DOES NOT VIOLATE AN ATTORNEY'S FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHTS BY CAUSING THE ATTORNEY TO BE SEARCHED WHEN HIS CLIENT IS TESTIFYING BEFORE A GRAND JURY.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law. *See* U.S.C. Constitution, Amendment 14, Section 1. A claim under the fourteenth amendment's due process

clause must be based on either substantive or procedural due process. *See Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972) (The requirements of procedural due process apply only to the deprivation of an interest encompassed by the fourteenth amendment's protection of liberty and property); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (due process clause of fourteenth amendment has a substantive component).

The substantive component of the due process clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them. *See Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986); *Collins v. City of Harker Heights, Tex.*, id., 503 U.S. at 125, 112 S.Ct. at 1068. The purpose of the due process clause is to prevent government officials from abusing their power or employing it as an instrument of oppression. *See County of Sacramento v. Lewis*, 523 U.S. ___, 118 S.Ct. 1708, 1713, 140 L.Ed.2d 1043 (1998); *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) (Due process clause contains a substantive component that bars arbitrary or wrongful government actions regardless of the fairness of the procedures used to implement them); *Daniels v. Williams*, id., 474 U.S. at 332, 106 S.Ct. at 662 (purpose of due process clause is to prevent government power from being used for purposes of oppression.) The substantive component of the due process clause is violated by executive action only when it can be characterized as arbitrary, or conscience shocking in a constitutional sense. *See County of Sacramento v. Lewis*, id., 523 U.S. ___, 118 S.Ct. at 1716-1717, *Collins v. City of Harker Heights*, id., 503 U.S. at 129, 112 S.Ct. at 1071 (Due process clause not violated unless deprivation of liberty interest was arbitrary in a constitutional sense); *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974) (The touchstone of due process is

protection of the individual against arbitrary action of government).

Prosecutors David Conn and Carol Najera did not engage in any arbitrary or wrongful conduct when the Special Master, Elliot Oppenheim, searched Respondent Paul Gabbert pursuant to a properly issued searched warrant, because Respondent did not have a constitutional right of any kind to be present inside the grand jury hearing room while his client was testifying before the grand jury. In *United States v. Mandujano*, 425 U.S. 564, 581, 96 S.Ct. 1768, 1779, 48 L.Ed.2d 212 (1976), this Court observed that a grand jury witness who had a right to the assistance of counsel could not demand that his attorney accompany him into the grand jury room, by stating:

> "A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel . . . under settled principles the witness may not insist upon the presence of his attorney in the grand jury room. Fed. Rule Crim. Proc. 6(d)." *See also U.S. v. Williams*, 504 U.S. 36, 49, 112 S.Ct. 1735, 1743, 118 L.Ed.2d 352 (1992).

Since a witness does not have a constitutional right to have his or her attorney present in the grand jury room, it naturally follows that the attorney of the witness does not have a constitutional right to be present with his client in the grand jury room. Thus, in the absence of a constitutional right belonging to the attorney to be present in the grand jury room with a witness, the conduct of Prosecutors Conn and Najera of subjecting Respondent to a valid search warrant while his client was testifying before the grand jury was neither arbitrary nor wrongful government conduct.[2]

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[2] In *Gabbert v. Conn*, 131 F.3d 793, 804 (9th Cir. 1997), the court acknowledged that the search conducted by the Special Master was pursuant to a lawful warrant.

The federal circuit courts have held that a grand jury witness does have a right to consult with an attorney waiting outside the grand jury room during the proceeding. *See, e.g., United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990); *United States v. Schwimmer*, 882 F.2d 22, 27 (2nd Cir. 1989); *In Re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir. 1988); *In Re Grand Jury Subpoena*, 97 F.3d 1090, 1093 (8th Cir. 1996). However, although a grand jury witness has a right to consult with an attorney outside of the grand jury room, this right belongs to the witness and not the attorney. Consequently, the attorney cannot predicate a claim under 42 U.S.C. Section 1983 on the rights of his client. *See Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) (plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the rights of third parties); In accord, *see Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955, 104 S.Ct. 2839, 2846, 81 L.Ed.2d 786 (1984).

Another reason prosecutors Conn and Najera did not engage in the kind of arbitrary and wrongful conduct the fourteenth amendment was designed to prevent is because each time grand jury witness Traci Baker asked to consult with Respondent, the grand jury proceedings were recessed to allow her to seek legal advice. For example, once the grand jury proceeding began, it was halted on three (3) separate occasions so that Traci Baker could consult with Respondent. On each of these occasions prosecutors Conn and Najera allowed the witness to leave the grand jury room without any restrictions on where, how long, or in what manner she could consult with Respondent. In addition, no limits were placed on the witness regarding what she could discuss with Respondent and there were no monitoring requirements placed upon her consultation with Respondent.

A further reason why the prosecutors did not engage in the kind of arbitrary or abusive conduct required to show a fourteenth amendment violation is because

Respondent was searched pursuant to a valid warrant. Government power is not used for oppression when the government is executing a valid and duly issued search warrant that only temporarily interrupts a person's activities, because implicit in the execution of a warrant is the interruption of a person's activities.

In light of the fact that the witness was given access to Respondent each time she made a request to consult with him, and because Respondent was available to his client even though he was being searched by the Special Master, pursuant to a valid warrant, the conduct of Petitioners Conn and Najera does not constitute the kind of arbitrary or wrongful conduct required for a substantive due process violation of the fourteenth amendment.

A. The Prosecutors Did Not Deprive Respondent Of A Fourteenth Amendment Liberty Interest Because He Was Not Excluded From The Practice Of Law.

One of the liberties protected by the due process clause of the fourteenth amendment is occupational liberty. *See Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959) (right to hold specific private employment and to follow a chosen profession free from unreasonable governmental inference is a liberty interest); *Board of Regents v. Roth*, id., 408 U.S. at 572, 92 S.Ct. at 2707 (liberty denotes right of individual to engage in any common occupation of life); *see also Meyer v. State of Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

A person is deprived of his fourteenth amendment liberty interest in occupational freedom when the conduct of the government excludes the person from his chosen occupation. For example, in *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957), this court held that the state deprived a person of his occupational liberty interest by denying him the license necessary to practice law:

> "A state cannot **exclude** a person from the practice of law or from any other occupation in a manner or for reasons that contravene due process." (Emphasis Added)

In *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), this court held that the denial of a security clearance to an employee of a military base did not deny the employee of her fourteenth amendment right to follow her chosen profession, because she remained free to obtain employment elsewhere or to get another job. In other words, all that she was denied was the opportunity to work at one isolated and specific military installation, which does not constitute a deprivation of the right to practice her profession.[3] This court has also held that a person's liberty interest in the right to practice his profession is violated where the person is effectively excluded from his occupation. *See, e.g., Dent v. State of West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889) (physician denied certificate to practice medicine). Further, in *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915), this court ruled that a due process claim may lie where the state acted to significantly diminish a person's chances of obtaining employment.

The significance of *Schware, supra, Cafeteria and Restaurant Workers Union, supra,* and *Truax, supra,* is that in order to deprive a person of a fourteenth amendment liberty interest, the government's conduct must somehow exclude the person from his occupation or trade. Similarly, the federal circuit courts have also required that a person be excluded in some way from his occupation or trade as a prerequisite for establishing a deprivation of a liberty interest. For example, in *Colaizzi v. Walker*, 812 F.2d

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[3] *See also Board of Regents v. Roth*, id., 408 U.S. at 575, 92 S.Ct. at 2708 (. . . it stretches the concept too far to suggest that a person is deprived of liberty when he is not rehired in one job but remains free to seek another).

304, 307 (1987),[4] the Seventh Circuit held that a person is deprived of a liberty interest when he is **banned** from his occupation or employment, by stating:

> "If a state or the federal government formally banned a person from a whole category of employment, it would be infringing liberty of occupation - a component of the liberty that the due process clause of the fifth and fourteenth amendment protect . . . " *See also Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337, 1343-44 (7th Cir. 1987).

In *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 (1994), the Ninth Circuit ruled that to show that a city's acts violated a person's substantive due process right to engage in the occupation of their choice, the city's conduct had to make plaintiffs unable to pursue an occupation in the amusement game business. Furthermore, in *Wedges/Ledges of California, Inc.*, id., 24 F.3d at 65, the Ninth Circuit ruled that the fact a city temporarily banned one (1) particular type of amusement game did not in itself establish that the city unduly interfered with either the gaming operators or manufacturer's ability to pursue their livelihood in the amusement game industry. In addition, in *FDIC v. Henderson*, 940 F.2d 465, 474 (1991), the Ninth Circuit ruled that to establish a deprivation of a liberty interest a state banking official must show that the acts of the state left him unable to pursue any comparable job in the banking industry.

In *Martin v. Memorial Hospital at Gulfport*, 130 F.3d 1143, 1149 (1997), the Fifth Circuit held that a hospital deprives a physician of his constitutionally protected liberty interest when it effectively forecloses the physician

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[4] The Seventh Circuit views occupational liberty as being protected by the procedural due process sphere and not the substantive due process component of the fourteenth amendment. *See Zorzi v. County of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994).

from practicing in the area. *See also Daly v. Sprague*, 675 F.2d 716, 727 (5th Cir. 1982). The Eleventh Circuit has also held that a person's liberty interest to follow a chosen profession free from unreasonable government interference only occurs when the plaintiff has been precluded from engaging in his profession. *See Pirolo v. City of Clearwater*, 711 F.2d 1006, 1011 (11th Cir. 1983); *see also Morley's Auto Body Inc. v. Hunter*, 70 F.3d 1209, 1217 n.5 (11th Cir. 1995).

The Prosecutors did not violate Respondent's fourteenth amendment right to occupational freedom (i.e., right to practice his profession) by causing him to be searched when his client testified before the grand jury, because the Petitioners' conduct did not ban nor exclude Respondent from practicing law. For example, Respondent could have asked Mr. Conn's secretary to tell his client to advise the prosecutors to wait until after the search was completed so that he could provide her with legal assistance. If Respondent had done this, the witness would have told the prosecutors she had not consulted with Respondent, and then the prosecutors would have delayed her testimony until after the search. However, instead of advising the prosecutors that she had not consulted with Respondent, the witness would instead return to the grand jury and invoke, on the advice of counsel, her fifth amendment right. Consequently, the prosecutors were led to believe that the witness had in fact consulted with Respondent, and therefore, the prosecutors continued the grand jury proceedings unaware that the witness had not consulted with Respondent.

Once the grand jury proceeding was concluded, Respondent continued to practice his profession by representing the witness at the contempt hearing. Hence, what happened to Respondent here is analogous to the situation where a person is not allowed to pursue a specific job, but is still able to pursue or practice his or her chosen occupation by way of another job or assignment. Yet the instant matter is less intrusive than the forbearance of a

specific job, because it is merely a brief delay in the pursuit of one's job. Therefore, since Respondent was only temporarily and legally interrupted in pursuing his job, and continued to pursue his job after the search, he was not deprived of occupational liberty.

Under federal case law there are essentially three (3) forms of state action that could result in a person being deprived of his fourteenth amendment right to pursue or engage in his profession. The first form is where state action stigmatizes a person so as to damage his reputation in the community such that he cannot earn a living in his chosen profession. *See Board of Regents of State Colleges v. Roth*, id., 408 U.S. at 573, 92 S.Ct. at 2707; *Paul v. Davis*, 424 U.S. 693, 709-710, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976). However, the foregoing form of a liberty deprivation was not alleged in the complaint by Respondent and it was rejected by the Ninth Circuit in any event. *See Gabbert v. Conn*, id., 131 F.3d at page 801, n.2.

The second situation where state action causes a deprivation of a person's right to practice his profession is where the person is denied the required license for practicing his profession. *See, e.g., Schware*, id., 353 U.S. at 238, 77 S.Ct. at 752. However, this case presents no licensing question. Finally, a person may be deprived of a liberty interest when he is denied collateral credentials necessary for pursuing his occupation. *See, e.g., Greene v. McElroy*, id., 360 U.S. at 492-493, 79 S.Ct. at 1411-1412. Once again, such a situation is not present here.

Since the conduct of the prosecutors in subjecting Respondent to a valid and lawful search while his client was testifying before the grand jury, did not result in Respondent being banned or foreclosed from practicing law, there was no fourteenth amendment substantive due process violation of his liberty interest. Further, any contention by Respondent that this fourteenth amendment rights were violated when he was subjected to a search when his client was testifying before the grand jury is

untenable, because each time the witness, Traci Baker, made a request to consult with Respondent, her request was granted. Also, when Traci Baker sought out Respondent while he was being searched, he replied that he "could not talk" because he was being searched, and "they" will have to wait. Once again, nothing precluded Respondent from replying that his client should tell the prosecutors to wait until after the search so that he could consult with her.

If Respondent had specified that his client should advise the prosecutors to wait until the search was completed, he could have consulted with her for as long as, and about any topic, and without any interruptions whatsoever, before she returned to the grand jury hearing room to resume her testimony. Hence, it was not the prosecutors' conduct which allegedly prevented Respondent from consulting with his client, but instead, it was his decision not to speak to his client and to inform her that she should tell the prosecutors to wait until after the search was completed.[5] In short, Respondent was afforded the ability and opportunity to consult freely with his client.

By choosing not to consult with his client when he had the opportunity to do so, which would have been after the search, Respondent was neither banned nor foreclosed by the prosecutors' conduct from practicing his profession. However, it is anticipated that Respondent will contend that the prosecutors violated his fourteenth amendment rights by relying on the case of *Keker v. Procunier*, 398 F.Supp. 756 (E.D. Cal. 1975), where the court held that an attorney's fourteenth amendment

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[5] The Prosecutors did not give the Special Master any directions on how or in what manner the search warrant should be executed. The Prosecutors did not advise the Special Master that the search, once commenced, could not be interrupted. Further, Respondent and the Special Master were alone while the search warrant was being executed.

rights were violated when the attorney had to meet with his client in a hot or uncomfortable room, and if the attorney's communications with his client were affected by telephone restrictions, surveillance, or partitions. Respondent's reliance on *Keker v. Procunier, supra,* here would be misplaced and unpersuasive, because what distinguishes *Keker* from the present action, is that here the prosecutors' interruptions of Respondent's alleged right to practice law was caused by a duly and lawfully issued search warrant. In contrast, in *Keker*, the restrictions placed on the attorneys were not due to a valid search warrant.

The significance of a valid search warrant lies in the fact that inherent in the execution of a search warrant is an interruption, distraction, or delay of the activities of the person being searched. Furthermore, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant and it may be necessary to interfere with rights not explicitly considered by the judge who issued the warrant. *See Dalia v. United States,* 441 U.S. 238, 257-258, 99 S.Ct. 1682, 1693, 60 L.Ed.2d 177 (1979). Thus, the fact that execution of a search warrant may result in temporary delay or inconvenience to what a person is doing, or of his or her daily activities, does not make the actions of the government officials causing the warrant to be executed arbitrary, abusive or wrongful. *See, e.g., Dalia v. U.S.*, id., 441 U.S. at 257-258, 99 S.Ct. at 1693-1694. Otherwise, in nearly every occasion wherein a search warrant is executed, a person could sue and recover damages under the fourteenth amendment arising from a lawful search. For example, suppose the police executed a valid search warrant on an attorney's law office while the attorney was in his office giving legal advice to a client. Further assume that as a result of the search the attorney is interrupted and delayed for a period of 20 minutes before he could finish advising his client. Has this attorney been deprived of his

fourteenth amendment liberty interest in the right to practice his profession free from governmental interference? The answer is an emphatic "No", because once the search is over the attorney will merely continue to practice his profession by advising his client. In comparison, once the search of Respondent was completed, he continued to practice his profession by representing the witness at a contempt proceeding shortly (i.e., approximatly 30 minutes) after the search of Respondent was completed. Hence, Respondent was not deprived of his fourteenth amendment right to practice his profession.

B. It Is Against Public Policy And Contrary To The Purposes Of The Fourteenth Amendment To Find A Violation Of The Fourteenth Amendment Where The Government Is Engaged In Lawful Conduct.

The substantive component of the due process clause is designed to prevent clearly arbitrary, wrongful and abusive government conduct. *See Zinermon v. Burch,* id., 494 U.S. at 125, 110 S.Ct. at 983; *County of Sacramento v. Lewis,* id., 118 S.Ct. at 1713; *Collins v. Harker Heights,* id., 503 U.S. at 126, 112 S.Ct. at 1069. Yet the Ninth Circuit's decision in *Gabbert v. Conn, supra,* is contrary to the purposes of the fourteenth amendment, as well as against public policy, because it allows for a fourteenth amendment substantive due process violation when the government is engaged in lawful and valid conduct. To illustrate, in *Gabbert v. Conn, supra,* the Ninth Circuit found a fourteenth amendment violation even though the search of Respondent was pursuant to a valid warrant and notwithstanding the fact that Respondent had no constitutional right to be with his client in the grand jury room. Also, the warrant was executed by a Special Master, as required by California law and the warrant could be executed any time between 7:00 a.m. to 10:00 p.m. Consequently, the Ninth Circuit penalized the prosecutors for engaging in lawful conduct by unjustifiably expanding Respondent's fourteenth amendment rights.

The Ninth Circuit's decision in *Gabbert v. Conn, supra,* is a dangerous precedent because it allows government officials to be exposed to fourteenth amendment liability for engaging in conduct that is lawful, and neither arbitrary nor abusive. For example, suppose an attorney was scheduled to meet his client who was a witness scheduled to testify before the Grand Jury Room at 10:00 a.m. Both the attorney and client also know that the attorney will not be allowed to be present in the grand jury hearing room, and the prosecutors know that the attorney must pass through metal detectors before he can be allowed to wait outside the grand jury hearing room. The witness testifies before the grand jury and during her testimony she asks to speak with her attorney. The prosecutors allow the witness to leave the hearing room to consult with her attorney, but she is unable to do so because her attorney and his briefcase are being searched by the court bailiffs at the metal detector station with the attorney's consent. Under the decision in *Gabbert v. Conn, supra,* the attorney who was subject to being searched at the metal detector station would have a fourteenth amendment claim against the prosecutors for an alleged violation of his right to practice his profession. Moreover, the attorney could even sue the bailiffs operating the metal detector because they delayed him in getting to his client.

Another example of the unfair and unreasonable consequences of the Ninth Circuit's decision in *Gabbert* is illustrated by the situation of where the police set up a roadblock. Suppose that the police set up a roadblock at the only road leading to the local courthouse, because they are searching for an escaped prisoner who is armed and dangerous and believed to be in the area. As a result of the roadblock, an attorney en route to the local courthouse for a trial is delayed for two (2) hours, because the police are searching the trunks and interiors of cars traveling the road. In addition, with the attorney's consent, the trunk and interior of his car is searched by the police before he can proceed to the courthouse.

When the attorney arrives at the courthouse he is two (2) hours late and upon his arrival he learns that the court has dismissed his case because he did not announce ready for trial when the case was called 90 minutes earlier. In accordance with the *Gabbert* decision the tardy attorney could bring a fourteenth amendment claim against the police operating the roadblock, because they deprived him of the right to practice his profession, which in this instance would be going to trial.

The roadblock hypothetical is a realistic one because it is factually analogous to the case of *Boyle v. City of Liberty, Mo.,* 833 F.Supp. 1436 (W.D. Mo. 1993). In *Boyle,* police officers established a roadblock to stop another vehicle being pursued by Highway Patrol Officers. At the time of the roadblock the defendant police officers maintaining the roadblock knew that traffic was heavy and that a shift change at many businesses in the nearby city was about to occur. The roadblock caused a mile long line of traffic in both lanes of travel. As a result of the roadblock and delay in which it caused, the plaintiffs sued the police officers operating the roadblock under 42 U.S.C. § 1983, for violating their right to freedom of employment, which was alleged to be a liberty interest protected by the due process clause of the fourteenth amendment. The District Court rejected the plaintiffs' fourteenth amendment claim, by stating at page 1446:

> Even if the plaintiffs intend a more conventional "freedom of employment" claim, the plaintiffs have not pled sufficient facts to state a claim for breach of that right. In *Board of Regents v. Roth,* 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972), the court stated that the concept of liberty incorporates the right of the individual "to engage in any of the common occupations of life." The state would breach that right if the state made a charge against a person that would seriously damage that person's standing and association in the community, or

> imposed a stigma or other disability that **foreclosed** future employment. Id. at 573, 92 S.Ct. at 2707. The plaintiffs in this case do not allege that their standing and associations in the community are damaged or that they are **foreclosed** from future employment. Accordingly, the court will dismiss the plaintiffs' claims for breach of the right of freedom of employment. (Emphasis added).

Since the *Gabbert* decision would allow police, prosecutors, and other government officials to be sued under the fourteenth amendment for conduct that was lawful, and no matter how minor the delay or distraction of a person's work, the *Gabbert* decision is against public policy and contrary to the purpose of the fourteenth amendment, because it stretches too far the concept of liberty.

C. The Prosecutors Did Not Deprive Respondent Of A Fourteenth Amendment Property Interest By Causing Him To Be Searched While His Client Testified Before The Grand Jury.

To establish a claim of deprivation of a property interest without due process of law, the Respondent must show he had a cognizable property interest. *See Board of Regents v. Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. However, in order to have a constitutionally protected property interest, the Respondent must have more than an abstract need or desire for it and he must also have more than a unilateral expectation of it. *See Board of Regents v. Roth*, id. To have a constitutionally protected property interest a person must have a legitimate claim of entitlement to the right. *See Board of Regents v. Roth*, id.

Property interests are not created by the constitution, but rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, or rules or

understandings that secure certain benefits and that support claims of entitlement. *See Roth*, id., 408 U.S. at 577, 92 S.Ct. at 2709; *Phillips v. Washington Legal Foundation*, 524 U.S. ___, 118 S.Ct. 1925, 1930, 141 L.Ed.2d 174 (1998).

To prove a governmental violation of a fourteenth amendment property interest a person must be excluded or somehow banned from his profession, or terminated from his job. *See, e.g., Perry v. Sinderman*, 408 U.S. 593, 599, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972) (The mere showing that a person was not rehired in one particular job, without more, does not amount to a showing of loss of property); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985) (Deprivation of property interest occurs if there is a right to continued employment).

In *Gabbert v. Conn, supra*, the Ninth Circuit did not characterize Respondent's fourteenth amendment claim as a deprivation of a property interest. Furthermore, the Respondent's complaint does not allege a deprivation of a property interest guaranteed to him by some independent source. Nevertheless, if Respondent now claims that being subjected to a search when his client went to testify before the grand jury was a deprivation of a property interest, such a contention would be meritless, because he was never foreclosed from practicing law and he did not lose his job of representing the witness. In fact, once Respondent's client's grand jury testimony was completed he immediately represented her at a contempt hearing. Consequently, in light of Respondent's failure to plead a deprivation of a property interest, and because he was neither banned from the further practice of law nor did he lose a job, there was no deprivation of a property interest under the fourteenth amendment.[7]

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[7] There was no deprivation of life without due process of law because Respondent was not killed by the prosecutors' conduct. *See County of Sacramento v. Lewis*, id., 118 S.Ct. at 1713.

D. The Prosecutors Did Not Violate The Fourteenth Amendment's Substantive Due Process Component Because They Were Neither Deliberately Indifferent Nor Did Their Conduct Shock The Conscience.

The touchstone of due process is protection of the individual against arbitrary action of the government or the exercise of Government power without any reasonable justification in the service of a legitimate governmental objective. *See County of Sacramento v. Lewis,* id., 118 S.Ct. at 1716. Thus, this court has consistently held that only the most egregious government conduct can be considered arbitrary in the constitutional sense. *See County of Sacramento v. Lewis,* id., 118 S.Ct. at 1716; *Collins v. Harker Heights,* id., 503 U.S. at 126-128, 112 S.Ct. at 1069-1070.

In *County of Sacramento v. Lewis,* id., 118 S.Ct. at 1717, this Court held that the substantive component of the due process clause is violated by executive action that is arbitrary, or conscience shocking, in a constitutional sense. *See also Collins v. Harker Heights,* id., 503 U.S. at 128, 112 S.Ct. at 1070 and *Rochin v. California,* 342 U.S. 165, 172-173, 72 S.Ct. 205, 209-210, 96 L.Ed. 183 (1952). For conduct to rise to the level of shocking the conscience it must at a minimum be deliberately indifferent conduct. *See County of Sacramento v. Lewis,* id., 118 S.Ct. at 1718-1720; *See also City of Canton, Ohio v. Harris,* 489 U.S. 378, 388-89, 109 S.Ct. 1197, 1204-05, 103 L.Ed.2d 412 (1989). In *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994), this court held that deliberate indifference is where an official knows of and disregards an excessive risk of harm. Further, according to *Farmer,* to establish deliberate indifference, the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference.

The prosecutors did not violate the fourteenth amendment when they caused Respondent to be searched while his client was testifying before the grand jury, because they did not knowingly engage in either egregious or unlawful conduct. To illustrate, the prosecutors' caused Respondent to be searched pursuant to a valid and lawful search warrant, and when the search was initiated, Respondent did not have a constitutional right of any kind to accompany his client into the grand jury hearing room. Once the grand jury proceeding began the prosecutors allowed the witness to leave the hearing room to consult with Respondent. Moreover, each time the witness returned to the grand jury room after being excused, she invoked her fifth amendment rights, upon the advice of counsel, which led the prosecutors to believe that she had the opportunity, and had in fact consulted with Respondent.

The prosecutors were never put on notice by either the witness or Respondent that the witness did not consult with Respondent when the prosecutors excused her to do so. Consequently, in the absence of the prosecutors having either notice or knowledge of the witness' inability to consult with Respondent, and because the prosecutors did not place any restrictions on the witness when she left the hearing room to consult with Respondent, the prosecutors' conduct did not rise to the level of "shocks the conscience" nor deliberate indifference. Furthermore, since the search warrant could be executed any time between 7:00 a.m. and 10:00 p.m., and due to the absence of any statute or other independent source that somehow prohibited an attorney from being searched when his client testified before a grand jury, the prosecutors' conduct did not constitute deliberate indifference. Thus, since the prosecutors did not act with deliberate indifference nor engage in conscience shocking conduct Respondent's fourteenth amendment rights were not violated.

E. The Prosecutors Did Not Violate The Respondent's Procedural Due Process Rights Because There Were Adequate State Law Tort Remedies Available.

The two (2) essential components of a claim for a violation of procedural due process are the deprivation of a constitutionally protected interest in life, liberty or property and second, the procedural safeguards surrounding the deprivation must be inadequate. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L.Ed.2d 265 (1982); *Zinermon v. Burch*, id., 455 U.S. at 125-126, 110 S.Ct. at 983. In *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), this court set forth the factors to weigh when determining what procedural protections the constitution requires in a particular case, by stating as follows:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

In essence, the constitution generally requires some kind of a hearing before the state deprives a person of a liberty or property interest. *See Zinermon v. Burch*, id., 494 U.S. at 127, 110 S.Ct. at 984; *Cleveland Board of Education v. Loudermill*, id., 470 U.S. at 542, 105 S.Ct. at 1493. However, the due process clause may also be satisfied where there is either a post deprivation hearing or a common law tort remedy. *See Zinermon v. Burch*, id., 494 U.S. at 128, 110 S.Ct. at 984; *Logan v. Zimmerman Brush Co.*, id., 455 U.S. at 436, 102 S.Ct. at 1158. In *Parratt v. Taylor*, 451 U.S. 527, 541, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981), this court

held that a state prisoner who had negligently been deprived of materials he had ordered by mail could not establish a claim for procedural due process because there were adequate post-deprivation state law tort remedies available to him, by stating:

> "The justifications which we have found sufficient to uphold taking of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place."

In *Hudson v. Palmer*, 468 U.S. 517, 533 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984), this court rejected a prisoner's procedural due process claim based upon the alleged deliberate and malicious destruction of his property, because there was a state law tort remedy available to him,[8] by stating:

> "If negligent deprivations of property do not violate the Due Process Clause because predeprivation process is impracticable, it follows that intentional deprivations do not violate that Clause provided, of course, that adequate state post-deprivation remedies are available. Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process

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[8] The *Parratt* doctrine also applies to a liberty deprivation. *See Zinermon v. Burch*, id., 494 U.S. at 132, 110 S.Ct. at 986-87.

> Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available."

The complaint filed by Respondent does not specifically allege a procedural due process claim and the Ninth Circuit's decision in *Gabbert v. Conn, supra,* was apparently based upon a substantive due process analysis and not a procedural due process violation. Nonetheless, in the event Respondent were to assert a procedural due process violation, it would be barred because California state law provides adequate post-deprivation state law tort remedies.

Under California law Respondent could have sued the prosecutors for negligence as a result of their decision to have him subjected to a search when his client was testifying before the grand jury. *See* California Government Code Sections 911.2 and 945.4. In addition, Respondent could have brought a tort action for intentional infliction of emotional distress. Also, Respondent could have pursued a tort claim under California Government Code Section 815.6, which authorizes a cause of action for breach of a mandatory duty. *See Braman v. State of California,* 28 Cal.App.4th 344, 348-349, 33 Cal. Rptr. 2d 608 (1994). Hence, since there were adequate post-deprivation tort remedies under California law the prosecutors did not violate the procedural due process component of the fourteenth amendment.

II. THE PROSECUTORS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE CAUSING THE ATTORNEY TO BE SEARCHED AT THE TIME HIS CLIENT WAS TESTIFYING BEFORE THE GRAND JURY DID NOT VIOLATE ANY CLEARLY ESTABLISHED FOURTEENTH AMENDMENT RIGHTS OF THE ATTORNEY.

According to the doctrine of qualified immunity government officials performing discretionary functions are

shielded from civil liability unless their actions violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Buckley v. Fitzsimmons,* 509 U.S. 259, 268, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993). The qualified immunity defense is designed to protect all but the plainly incompetent or those who knowingly violate the law. *See Malley v. Briggs,* 475 U.S. 335, 441, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986); *Burns v. Reed,* 500 U.S. 478, 494-495, 111 S.Ct. 1934, 1944, 114 L.Ed.2d 547 (1991).

In order for a right to be clearly established the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. *See Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Although a plaintiff is not required to show that the very conduct in question has been held unlawful, he is however, required to demonstrate that the unlawfulness was **apparent** in light of clearly established law. *See Anderson v. Creighton,* id., 483 U.S. at 640, 107 S.Ct. at 3039. It is especially important in the context of an alleged due process clause violation that the unlawfulness of the alleged conduct be apparent in light of legal rules that were "clearly established" at the time the conduct was taken,[9] because in *Anderson v. Creighton,* id., 483 U.S. at 639, 107 S.Ct. at 3039, this court stated:

> "For example, the right to due process of law is quite clearly established by the Due Process clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test

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[9] *See also Seigert v. Gilley,* 500 U.S. 226, 231, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991).

> of "clearly established law" were to be applied at this level of **generality**, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely **abstract rights**." (Emphasis added)

A right is not clearly established if government officials of reasonable competence could disagree on the issue. *See Malley v. Briggs*, id., 475 U.S. at 341, 106 S.Ct. at 1096. Nonetheless, in *Gabbert v. Conn*, id., 131 F.3d at 801, n.2, the Ninth Circuit identified the right that the prosecutors allegedly violated to be interference with an attorney's ability to practice his profession. The Ninth Circuit also defined Respondent's right as the ability to freely render legal assistance to his client whenever she chose to seek his advice regarding her grand jury testimony. Although the Ninth Circuit never expressly defined the right as arising under the procedural or substantive component of the fourteenth amendment, the right can only be characterized as part of the substantive component; specifically a liberty interest, of the due process clause. *See Zinermon v. Burch*, id., 494 U.S. at 125, 110 S.Ct. at 983.

In *Gabbert v. Conn*, id., 131 F.3d at 801, the Ninth Circuit implicitly conceded that the newly created right to freely render legal assistance to a client whenever the client sought advice was not clearly established, by stating:

> "The unusual facts of this case preclude the very action in question to be clearly established in our case law."

Nevertheless, the Ninth Circuit inappropriately expanded Respondent's fourteenth amendment rights by reference to the non-legal, abstract and open-ended concept of common sense. It was improper for the Ninth

Circuit to create a new and expansive fourteenth amendment right for Respondent under the guise of common sense, because for the law to be clearly established it must be so in light of existing law, instead of newly created law. *See Anderson v. Creighton*, id., 483 U.S. at 639, 107 S.Ct. at 3038.

As a general matter this court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended. *See Collins v. Harker Heights*, id., 503 U.S. at 125, 112 S.Ct. at 1068; *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226, 106 S.Ct. 507, 513-514, 88 L.Ed.2d 523 (1985). The Ninth Circuit's decision in *Gabbert* reformulates the meaning of a person's liberty interest in occupation freedom or the right to pursue employment of one's choosing, in a manner that is both inconsistent with, and contrary to previous decisions of this court, prior Ninth Circuit authority, and past decisions of other circuits as well. Neither this Court nor any of the 12 federal circuit courts have held that a prosecutor who causes an attorney to be searched pursuant to a valid warrant, while the attorney's client is testifying before a grand jury, violates the attorney's fourteenth amendment rights. Furthermore, there is no analogous case from this court, the 12 federal circuit courts nor the district courts, that would have made it apparent to or given fair warning to a prosecutor that he violates an attorney's rights under the fourteenth amendment by causing him to be searched, pursuant to a valid warrant that can be executed any time during the day, simply because his client is testifying before the grand jury. Moreover, there was no clearly established case law from this court or the lower federal courts that made it apparent that an attorney's fourteenth amendment rights included the right to freely consult

with his client whenever the client sought his legal advice, notwithstanding the fact that the government was executing a valid search warrant on the attorney.

Since the Ninth Circuit's newly created expansion of Respondent's fourteenth amendment rights was not clearly established in light of pre-existing law in March, 1994, the Prosecutors are entitled to qualified immunity.

A. Under Pre-existing U.S. Supreme Court Authority Respondent Did Not Have A Clearly Established Right Under The Fourteenth Amendment That Prevented The Prosecutors From Causing Him To Be Searched When His Client Testified Before The Grand Jury.

A review of U.S. Supreme Court legal precedent on the right to occupational freedom or to pursue employment of one's choosing shows that as of March, 1994, this court had not ruled that the fourteenth amendment liberty interest of occupational freedom included the right of an attorney to give legal assistance to his client whenever the client sought his assistance. Moreover, there is no analogous precedent from this court that would have made it apparent to the prosecutors in March, 1994, that they violated an attorney's rights under the fourteenth amendment by causing him to be searched pursuant to a valid warrant, while the attorney's client was testifying before the grand jury. Since the attorney does not have a right to be present in the grand jury hearing room when his client testifies,[10] and because previous decisions of this court have only found a violation of occupational liberty when a person is either excluded or foreclosed

[10] *See U.S. v. Mandujano*, id., 425 U.S. at 581, 96 S.Ct. at 1779.

from his profession,[11] a reasonable prosecutor was not on notice as of March, 1994, that causing an attorney to be searched pursuant to a valid warrant was a violation of clearly established law. Further, this court has never held that the execution of a valid search warrant violates a person's right to occupational freedom, and this court has not held that a person's fourteenth amendment right to practice his profession can delay the execution of a valid search warrant.

The situation that Respondent was confronted with can be best characterized as being legally distracted or delayed from practicing his profession. For example, when Respondent was advised during the search that his client wanted to speak with him he replied that he couldn't talk to her because he was being searched and "they" would have to wait. However, the prosecutors did not know that Traci Baker failed to consult with Respondent each time they excused her to seek his assistance. The significance of this is that any reasonable prosecutor would have believed that if he or she allowed the witness to leave the grand jury room to consult with her attorney, and that upon the return of the witness she does not notify the prosecutors that she did not consult her attorney as she requested, then the witness must have consulted with her attorney as she requested. Moreover, when added to this scenario is the fact that after the witness returns to resume her testimony, she asserts her fifth amendment rights on the advice of counsel. Thus, any reasonable prosecutor would conclude that the witness had been given access to her attorney and that the attorney practiced his profession unencumbered.

The factual circumstances confronting the prosecutors in this case highlights why this court should adopt a

[11] *See Schware v. Bd. of Bar Exam of State of N.M.*, id., 353 U.S. at 238, 77 S.Ct. at 756; *Cafeteria and Restaurant Workers Union v. McElroy*, id., 367 U.S. at 896, 81 S.Ct. at 1749.

standard for what constitutes the establishment of clearly established law, whereby the law is clearly established when the issue has been decided by a factually similar or closely analogous factual case that has been decided by this court before the alleged wrongful conduct occurred. If this court were to adopt such a standard as the test for determining when clearly established law is violated, the prosecutors in this case would be entitled to qualified immunity.

Allowing the standard for determining when clearly established law exists to be where a similar or closely analogous factual case on the issue has been decided by this court would be beneficial because it would eliminate conflicts within the federal circuit courts,[12] and it would also eliminate the need for state courts to choose among conflicting circuit court decisions. To illustrate, the decisions of the Ninth Circuit are not binding on the Tenth Circuit. *See F.D.I.C. v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992); *see also Caldwell v. Moore*, 968 F.2d 595, 599 (6th Cir. 1992) (To determine whether a right is clearly established sixth circuit generally does not rely on cases from other federal circuits) and *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1257-58 n.9 (10th Cir. 1998). Furthermore, when the federal circuits are in conflict, the authority of the Ninth Circuit is entitled to no greater weight than decisions from other circuits in Section 1983 actions brought in state courts. *See Alicia T. v. County of Los Angeles*, 222 Cal.App.3d 869, 879, 271 Cal. Rptr. 513 (1990).[13]

Hence, if this court adopts the standard for determining clearly established law which Petitioners urge herein, state courts would not have to choose between conflicting

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[12] But see *United States v. Lanier*, 520 U.S. ___, 117 S.Ct. 1219, 1226-27, 137 L.Ed.2d 432 (1997).

[13] State Courts of general jurisdiction have concurrent authority to adjudicate claims arising under 42 U.S.C. § 1983. *See Martinez v. California*, 444 U.S. 277, 283 n.7, 100 S.Ct. 553, 558 n.7, 62 L.Ed.2d 481 (1980).

federal circuit court decisions, or deciding for themselves, when the law is clearly established for the purpose of invoking qualified immunity. Therefore, without the adoption of the standard being proposed by Petitioners there will be numerous conflicting and inconsistent decisions on qualified immunity in both the federal circuit and state courts. This will be especially true in the area of fourteenth amendment substantive due process claims because the due process clause is inherently abstract and open-ended. *See Collins v. Harker Heights*, id., 503 U.S. at 125, 112 S.Ct. at 1068; *Anderson v. Creighton*, id., 483 U.S. at 639, 107 S.Ct. at 3039.

In the absence of a prior decision by this Court that the execution of a valid search warrant can violate a person's right to practice his profession or that the right to practice one's profession can be a basis for delaying or preventing the execution of a lawful search warrant, the prosecutors are entitled to qualified immunity.

B. The Law Was Not Clearly Established In The Federal Circuits In March 1994 That A Prosecutor Violates An Attorney's Fourteenth Amendment Rights By Causing Him To Be Searched When His Client Is Testifying Before The Grand Jury.

Under the federal circuit precedents as of March, 1994, a reasonable prosecutor would not have known that he violated clearly established law, in particular, the fourteenth amendment, by causing an attorney to be searched, pursuant to a valid warrant, when the attorney's client was testifying before the grand jury. Since this case arises from a Ninth Circuit decision it is appropriate to first examine Ninth Circuit authority that was available in March, 1994 to determine whether the prosecutors were on notice that their conduct violated clearly established law announced in the Ninth Circuit.

In *FDIC v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991), the plaintiff, a former bank president alleged that his substantive due process rights under the fourteenth amendment were violated because he was wrongfully discharged by a state banking official. However, the Ninth Circuit rejected the plaintiff's substantive due process claim, which was predicated on his right to pursue the occupation of his choice, because plaintiff, even though he was discharged, could still pursue a job in the banking industry, by stating:

> "In order to state such a substantive due process claim [right to pursue occupation of choice] Wood must show, first, that he is unable to pursue a job in the banking profession."

In light of *Henderson*, a reasonable prosecutor would have concluded in March, 1994, that to violate an attorney's fourteenth amendment rights, his or her conduct had to exclude the attorney from the practice of law. In *Di Martini v. Ferrin*, 889 F.2d 922, 927-928 (9th Cir. 1988), a case in which the alleged wrongful conduct of government officials resulted in the plaintiff losing his job, the plaintiff made a claim for a violation of his liberty and property interest, based upon alleged officious third party interference with his private employment. The distinguishing feature between *Di Martini* and the instant case is that in *Di Martini* the plaintiff lost his job whereas here Respondent did not lose his job and continued to represent witness Traci Baker after the alleged wrongful conduct occurred. Thus, *Di Martini*, does not make it apparent to a reasonable prosecutor that subjecting an attorney to a search while his client is before the grand jury is unlawful.

In *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1988), the court held that a bar owner properly stated a claim for a violation of the due process clause based upon a denial of his liberty and property interest in pursuing

occupational freedom when police conduct was intentionally directed toward forcing the bar owner out of business. In contrast, here Respondent was searched pursuant to a valid warrant and the prosecutors were not intentionally trying to force Respondent out of the entire practice of law nor from the representation of his client.

In another related case, but one decided about 6 weeks after March, 1994, the Ninth Circuit in *Wedges/Ledges of California Inc. v. City of Phoenix*, 24 F.3d 56 (1994), ruled that in order to establish a substantive due process claim based upon the alleged violation of the right to engage in the occupation of one's choice, the person must be excluded from their chosen occupation. In *Wedges/Ledges*, a city banned plaintiffs from offering a particular type of amusement game, which the plaintiffs contended interfered with their ability to pursue their livelihood in the amusement game industry, but the Ninth Circuit denied plaintiffs' claim by stating at page 65, as follows:[14]

> "As an initial matter, we note that the fact that the city temporarily banned one particular type of amusement game does not in itself establish that the city unduly **interfered** with either the game operators' or manufacture's ability to pursue their livelihood in the amusement game industry." (Emphasis added)

Based upon Ninth Circuit case law as of March, 1994, a reasonable prosecutor would have concluded that in order to violate an attorney's fourteenth amendment rights he had to exclude or foreclose the attorney from the practice of law. However, here, the prosecutors did not ban the attorney from the practice of law. At worst, the prosecutors, in exercising a lawful search warrant,

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[14] The Ninth Circuit cited as examples the cases of *FDIC v. Henderson, supra,* and *DiMartini v. Ferrin, supra,* when making its ruling.

may have inadvertently delayed or distracted Respondent from practicing law for a matter of less than 18 minutes, because Traci Baker's grand jury testimony began at 10:54 a.m. and ended at 11:12 a.m. Yet, during this time span the prosecutors excused her three times, without any restrictions, to consult with Respondent. More importantly, after Traci Baker's grand jury testimony was concluded Respondent continued his legal representation of her by acting as her counsel at the contempt proceeding.

As of March, 1994, there was nothing in Ninth Circuit case law that would have made it apparent to the prosecutors that they violated Respondent's fourteenth amendment rights by having him searched pursuant to a valid warrant when his client was testifying before the grand jury. Furthermore, there was certainly no analogous Ninth Circuit case, in terms of facts that would have made it obvious to the prosecutors that their conduct was in violation of clearly established law. Also, there was no Ninth Circuit case that made it apparent to the prosecutors that they acted arbitrarily in causing Respondent to be searched pursuant to a valid warrant, or when they granted each of Traci Baker's requests to consult with her attorney. *See, e.g., Wedges/Ledges of California, Inc. v. City of Phoenix Ariz.*, id., 24 F.3d at 66 (no fourteenth amendment violation when city's conduct was not clearly arbitrary).

A survey of the case authority from the Seventh Circuit also shows that the prosecutors did not violate the clearly established law in effect in March 1994. In *Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987), the court held that a state violates the due process clause of the fourteenth amendment when it bans a person from a whole category of employment, because it deprives a person of occupation liberty. In *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (1992), the Seventh Circuit held that a person is not deprived of occupational liberty when he is denied a specific job, by stating:

> "It is the liberty to pursue a calling or occupation, and not the right to a specific job that is secured by the fourteenth amendment."

Similarly, in *Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337, 1343-1344 (7th Cir. 1987), the court held that a psychologist who was not denied his license to practice psychology, and did not have his hospital privileges revoked, was not deprived of occupational liberty because he only suffered a curtailment of his occupational freedom, which is not a deprivation of his rights. *See also Bloyer v. Peters*, 5 F.3d 1093, 1092-1093 (7th Cir. 1993).

According to Seventh Circuit precedent as of March, 1994, a reasonable prosecutor confronted with the facts and circumstances facing Petitioners on March 21, 1994, would have concluded that to violate Respondent's fourteenth amendment rights they had to either exclude Respondent from the practice of law or somehow foreclose him from obtaining legal business.

Based upon the available Seventh Circuit precedent the most analogous case to the case at bar is *Illinois Psychological Ass'n v. Falk*, id., 818 F.2d at 1343-1344, which instructs that a curtailment of occupational freedom does not constitute a deprivation of fourteenth amendment rights. In comparison, when the prosecutors caused Respondent to be searched when his client was testifying, the worst that happened to Respondent was a curtailment of his occupational freedom, but they did not **deprive** him of his liberty interest. Thus, what happened to Respondent could be characterized as a legally necessary and slight delay in practicing his profession, or in other words, a required, but temporary curtailment of his occupational freedom, which does not constitute a liberty deprivation. Consequently, in light of the state of the law in the Ninth and Seventh Circuits in March, 1994, it was neither apparent nor clearly established that the conduct

of the prosecutors was a violation of the Respondent's fourteenth amendment rights.

The result reached by the Ninth Circuit in *Gabbert v. Conn*, id., reveals why the standard for determining when the law is clearly established needs to be explained more fully by this court in its decision of this case. In Section II(A), *supra*, of this brief Petitioners proposed a test for determining whether the law was clearly established, in which the issue must have been decided by a factually similar or closely analogous factual case decided by this court. In the event this court rejects the standard for clearly established law proposed by Petitioners in Section II(A), herein, this Court should adopt as the standard for clearly established law the bright line test followed by the Eleventh Circuit. Under the bright line standard the law is only clearly established when the case law, in factual terms, has staked out a bright line. *See Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993); *Rowe v. Schreiber*, 139 F.3d 1381, 1383-1384 (11th Cir. 1998). According to the bright line standard the line is not found in abstractions, but in studying how these abstractions have been applied in concrete factual circumstances. *See Post v. City of Fort Lauderdale*, id., 7 F.3d at 1557. The benefit of the bright line standard is that public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases. *See Rowe v. Schreiber*, id., 139 F.3d at 1384.

The fact specific bright line standard for determining whether the law is clearly established has been applied, in some fashion and not necessarily under the same name, by other federal circuits. *See, e.g., Cope v. Heltsley*, 128 F.3d 452, 459 (6th Cir. 1997) (specific factual context used to determine qualified immunity); *Chan v. Wodnicki*, 123 F.3d 1005, 1008 (7th Cir. 1997) (qualified immunity available unless the law was clear in relation to the specific facts confronting the public official); *Brown v. Ives*, 129 F.3d 209, 211 (1st Cir. 1997) (it is not enough that right

claimed to be violated has been recognized at an abstract level, existing case law has to give the official reason to know that the specific conduct was prohibited); *Baptiste v. J.C. Penney Co.*, id., 147 F.3d at 1255-56 (plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law); *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (officials are not liable for bad guesses in gray areas; they are only liable for trangressing bright lines).

In contrast to the bright line standard is the Ninth Circuit's newly established "common sense" test, which does not rely on fact specific case precedent, but instead applies the abstract and elusive concept of common sense. *See Gabbert v. Conn*, id., at 801 and *see also Pro v. Donatucci*, 81 F.3d 1283, 1292 (3rd Cir. 1996) (law clearly established despite a split in circuits, as long as no gaping divide has emerged in jurisprudence such that defendants could reasonably expect this circuit to rule to the contrary).

Under the bright line standard Petitioners would be entitled to qualified immunity, because the law was not clearly established under the unique facts confronting Petitioners. *See Gabbert v. Conn*, id., 131 F.3d at 801. However, under the Ninth Circuit's "common sense" test Petitioners were denied qualified immunity. The danger posed by the common sense test is that the concept of common sense is too abstract and undefined to provide public officials with clear and well defined guidelines when they engage in discretionary functions, because what is common sense to one person may be completely different to another. Consequently, under the Ninth Circuit's standard, public officials would either have to guess what is clearly established law or be imaginative and creative when analyzing the pre-existing law from the 12 federal circuits. Moreover, under the Ninth Circuit's "common sense" analysis, plaintiffs would be able to convert the rule of qualified immunity into a rule of

virtually unqualified liability simply by alleging a violation of abstract rights; namely, common sense, which has been condemned by this court. *See, e.g., Anderson v. Creighton,* id., 483 U.S. at 639, 107 S.Ct. at 3039; *Collins v. Harker Heights,* id., 503 U.S. at 125, 112 S.Ct. at 1068 (guideposts for substantive due process are scarce and open-ended).

Another problem posed by the "common sense" test is that virtually any distraction or delay the state imposes on a person engaged in the practice of their profession, regardless of the nature of interruption or justification for it, would constitute a violation of clearly established law. For example, under *Gabbert v. Conn,* id., anytime government officials delayed or distracted an attorney in practicing law, regardless of the reason or justification for the delay, or the length of the interruption, the official would be in violation of clearly established law. Consequently, whenever a person was pursuing his occupation or engaged in work, government officials would never be entitled to qualified immunity, which would eliminate the qualified immunity defense in an entire category of cases. In addition, Government officials would be reluctant to engage in even lawful conduct, such as executing a valid search warrant, out of fear of being sued for violating the fourteenth amendment.

The bright line standard is the proper and better approach than the Ninth Circuit's "common sense" test, because the bright line standard preserves the principal purpose of the qualified immunity defense, which is to provide protection to all but the plainly incompetent or those who knowingly violate the law. *See Malley v. Briggs,* id., 475 U.S. at 341, 106 S.Ct. at 1096. It also furthers the goal of protecting government officials from undue interference with their duties and from potentially disabling threats of liability. *See Harlow v. Fitzgerald,* id., 457 U.S. at

807, 102 S.Ct. at 2732. Lastly, it allows government officials to exercise and perform their discretionary duties without being unduly second guessed.

Since there are no cases from any of the 12 federal circuit courts that have held that an attorney's fourteenth amendment right to practice his profession free from governmental interference can delay or preclude the execution of a valid search warrant on the attorney when his client is testifying before a grand jury, or when the attorney is advising his client, the Petitioners did not violate any clearly established law that was apparent to a reasonable prosecutor. Further, the absence of an analogous case from the federal circuit courts on the question of whether the execution of a valid search warrant, that can be executed any time between 7:00 a.m. and 10:00 p.m., can deprive a person of his fourteenth amendment right to practice his profession entitles the prosecutors to qualified immunity.

C. The Extent Of An Attorney's Fourteenth Amendment Rights Were Not Clearly Established By The District Court Decision Of *Keker v. Procunier.*

In *Keker v. Procunier,* 398 F.Supp. 756, 761-763 (E.D. Cal. 1975), the Court observed that prison officials interfered with an attorney's right to practice his profession if the attorneys were forced to meet their clients in an uncomfortably hot room when other more amenable facilities are reasonably available, and if communication between attorney and client is circumscribed by partitions, limited by telephone restrictions and subject to continual surveillance. A reasonable prosecutor who had read or was aware of the *Keker* decision in March, 1994, and was faced with the same factual circumstances as

Petitioners, would not have known that causing Respondent to be searched while his client was before the grand jury violated clearly established law for several reasons.

First, Respondent did not have a constitutional right to be present with his client in the grand jury room, and when his client asked permission to consult with him, the witness was excused from the grand jury room and no restrictions were placed on either the witness or Respondent when the witness was excused. Further, the search of Respondent was pursuant to a valid warrant that could be executed any time during business hours, and the search lasted only a matter of minutes and it occurred in a private room. Also, there was nothing to prevent Respondent from merely waiting until after the search to consult with his client. Furthermore, the prosecutors, once they excused the witness to consult with Respondent were never notified or advised that the witness had not consulted freely with Respondent.

Another reason why the case of *Keker v. Procunier*, id., should not be the basis for a finding that the Petitioners violated clearly established law is the fact that it is only a district court decision. Generally, for the law to be clearly established it must be done by way of a decision by this court, a Federal Circuit Court of Appeal or a state supreme court. *See, e.g., Baptiste v. J.C. Penney Co.*, id., 147 F.3d at 1257, n.9; *Cope v. Heltsley*, id., 128 F.3d at 459, n.4; *Wilson v. Lane*, 141 F.3d 111, 114 (4th Cir. 1998); *Jenkins By Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997). Consequently, a single district court decision, which is distinguishable on its facts from the case at bar, is insufficient to clearly establish that a reasonable prosecutor should have known that Respondent could not be subjected to a search once his client was before the grand jury.

The problem posed by allowing a district court decision to be the basis for establishing clearly established law is that with 12 federal circuits and 50 state supreme

courts, requiring prosecutors to be familiar with the numerous district court decisions as well as the federal circuit and state supreme court opinions places a tremendous and overwhelming legal research burden and responsibility on prosecutors. For example, the *Keker v. Procunier*, id., case is one of a kind and nearly 20 years old as of March, 1994, and it is highly unlikely that in March, 1994, a local county prosecutor would be familiar with the rulings articulated in *Keker*. Therefore, it is doubtful that the unique and sole case of *Keker* was known to or even read by local Prosecutors because they specialize in criminal law and not federal civil rights claims arising under the due process clause of the fourteenth amendment.

In the event this court finds that a single district court decision is insufficient to show that the law is clearly established, which is the approach generally taken by the federal circuit courts, the prosecutors would be entitled to qualified immunity. On the other hand, if this court concludes that the law can be clearly established on the basis of a single district court decision that has not been tested by a Court of Appeal, the prosecutors are still entitled to qualified immunity because *Keker v. Procunier*, id., does not stand for the proposition that an attorney's fourteenth amendment right to practice his profession is cause to delay or prevent the execution of a valid search warrant.

CONCLUSION

For the reasons hereinabove stated, Petitioners David Conn and Carol Najera pray that the decision below from the U.S. Court of Appeals for the Ninth Circuit, finding that Petitioners deprived Respondent of his fourteenth amendment rights and that Petitioners were not entitled to qualified immunity, be reversed and that Petitioners be awarded their costs.

Dated: November 18, 1998

Respectfully submitted,

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